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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Alejandro Castillo, et al.,  
10 Plaintiffs,  
11 v.  
12 K.B. Wallworx Incorporated, et al.,  
13 Defendants.  
14

No. CV-22-00798-PHX-DWL  
**ORDER**

15 Pending before the Court is Plaintiffs’ motion for preliminary certification of a  
16 collective action under the Fair Labor Standards Act (“FLSA”). (Doc. 41.) For the  
17 following reasons, the motion is granted.

18 **BACKGROUND**

19 On May 10, 2022, Plaintiffs Alejandro Castillo and Gary Humm filed this FLSA  
20 collective action against Spencer’s Air Conditioning & Appliance Incorporated, doing  
21 business as Spencer’s TV & Appliance, (“Spencer’s”), K.B. Wallworx Incorporated, doing  
22 business as K.B. Appliance (“KB Wallworx”), Kenneth Charles Bruning, and Lori Ann  
23 Bruning (together, “the Brunings”). (Doc. 1.) “Plaintiffs bring this action on behalf of  
24 themselves and as a collective action on behalf of all other similarly situated current and  
25 former delivery and installation employees (the installation employees) working for KB  
26 Walworx at any time during the last three years delivering and installing televisions,  
27 appliances and other items bought at Spencer’s TV & Appliance stores.” (*Id.* ¶ 2.)  
28 Plaintiffs assert that “[p]ursuant to the legal definitions and statutory provisions of the

1 FLSA, Defendants KB Wallworx and Spencer's served as joint employers of Plaintiffs and  
2 the other installation employees." (*Id.* ¶ 4.)

3 The allegations in the complaint are as follows. Spencer's operates a chain of stores  
4 in Arizona selling televisions and various appliances. (*Id.* ¶ 35.) Spencer's also advertises  
5 and sells delivery and installation services for its products. (*Id.* ¶ 36.) Spencer's sets the  
6 cost and schedule for delivery and installation services and customers pay Spencer's  
7 directly for these services. (*Id.* ¶¶ 37-39.) Spencer's website invites customers to "[l]et  
8 the experienced professionals at Spencer's TV & Appliance handle [their] delivery and  
9 installation needs" and informs customers that Spencer's "screen[s] all employees [for  
10 symptoms of illness] everyday [sic] prior to going on delivery." (*Id.* ¶¶ 40-41.)

11 Spencer's contracts with several companies to deliver and install its products,  
12 including KB Wallworx. (*Id.* ¶¶ 51-52.) KB Wallworx "is in the business of 'Appliance  
13 Installation'" and receives a fee from Spencer's for providing delivery and installation  
14 services. (*Id.* ¶¶ 53-54.) KB Wallworx "does not contract with any other appliance dealer."  
15 (*Id.* ¶ 56.)

16 KB Wallworx hired Plaintiffs to work as installation employees. (*Id.* ¶¶ 57, 59.)  
17 "Plaintiffs and the other installation employees were compensated by being paid a set dollar  
18 amount for each day they worked plus a percentage of the amount paid for each TV or  
19 appliance the customer purchased at Spencer's stores" but "were not paid overtime wages  
20 despite consistently working over 40 hours each workweek." (*Id.* ¶¶ 61-62.)

21 KB Wallworx classified Plaintiffs and others as "independent contractors," but  
22 "Plaintiffs never negotiated, entered into, or signed an independent contractor agreement"  
23 and "did not negotiate the compensation or fees they received for their delivery and  
24 installation work." (*Id.* ¶¶ 58-60, 63-64.) "Plaintiffs and the other installation employees  
25 are told when and where to start their workday" and "are required to wear KB Appliance  
26 shirts while working." (*Id.* ¶¶ 71-72.) "Spencer's provides Plaintiffs and the other  
27 installation employees with the proprietary materials, installation kits, fittings, brackets,  
28 hoses, etc. required to complete each installation." (*Id.* ¶ 74.) Spencer's also required

1 installation employees to download a cell phone application called “Package AI” that  
 2 allowed Spencer’s “to inform Plaintiff Castillo and other installation employees of the  
 3 number of deliveries they had scheduled each workday” and “to track Plaintiff Castillo in  
 4 real time and continuously monitor his location using the GPS capability built into his cell  
 5 phone.” (*Id.* ¶¶ 75, 79-80.) Spencer’s paid the subscription fee for this app. (*Id.* ¶ 75.)  
 6 “Spencer’s, KB Wallworx, [and the Brunings] used frequent text messages, emails and  
 7 Package AI to monitor, direct, request status updates, communicate with, and provide  
 8 schedule updates to supervise and control the work schedule and conditions of employment  
 9 for Plaintiffs and the other installation employees.” (*Id.* ¶ 84.) “Plaintiffs and the other  
 10 installation employees could not decide which delivery or installation assignments to  
 11 accept or reject.” (*Id.* ¶ 86.) Spencer’s dissatisfaction with an installation employee “could  
 12 lead to counseling, discipline or potential termination.” (*Id.* ¶ 88.) The complaint asserts  
 13 that “Plaintiffs and the Collective Action Members were employees and did not meet the  
 14 legal or statutory requirements needed to be classified as independent contractors by  
 15 Defendants” and that “Defendants KB Wallworx and Spencer’s were joint employers of  
 16 Plaintiffs and the Collective Action Members” and alleges facts to support these assertions.  
 17 (*Id.* ¶¶ 90-101.)

18 Plaintiffs assert that they “and the other Collective Action Members routinely  
 19 worked well in excess of forty hours during most workweeks without receiving overtime  
 20 wages” due to “an ongoing illegal and improper scheme by Defendants to systematically  
 21 and willfully violate the provisions of the FLSA.” (*Id.* ¶¶ 105-06.)

22 On July 26, 2022, Spencer’s filed an answer to the complaint. (Doc. 19.)

23 On August 12, 2022, KB Wallworx and the Brunings filed a motion to dismiss for  
 24 lack of subject-matter jurisdiction. (Doc. 23.) That motion later became fully briefed.  
 25 (Docs. 25, 33.)

26 On August 31, 2022, the Court issued a scheduling order. (Doc. 28.)

27 On January 17, 2023, Plaintiffs, KB Wallworx, and the Brunings filed a notice of  
 28 settlement (Doc. 36), and the Court denied the motion to dismiss those Defendants as moot

1 (Doc. 37).

2 On February 16, 2023, Plaintiffs filed a notice of dismissal (Doc. 38), pursuant to  
3 which KB Wallworx, and the Brunings were dismissed (Doc. 40), leaving Spencer's as the  
4 sole remaining Defendant.

5 On May 23, 2023, Plaintiffs filed a motion for preliminary certification and notice  
6 of lawsuit (the "preliminary certification motion"). (Doc. 41.)

7 On June 16, 2023, Spencer's filed a response opposing the preliminary certification  
8 motion. (Doc. 44.) That same day, Spencer's filed a motion for summary judgment (Doc.  
9 45), which asserts that "[t]he question of whether Spencer's is an 'employer' under the  
10 FLSA is a legal issue for the Court" and "[b]ased on the undisputed facts of this case,  
11 Spencer's does not . . . qualify as a joint employer." (Id. at 2.)

12 On June 26, 2023, Plaintiffs filed a reply in support of the preliminary certification  
13 motion. (Doc. 47.)

14 On July 31, 2023, Plaintiffs filed a response to Spencer's summary judgment  
15 motion. (Doc. 51.)

16 On August 14, 2023, Spencer's filed a reply in support of its summary judgment  
17 motion. (Doc. 52.)

## 18 DISCUSSION

### 19 I. Legal Standard

20 The FLSA provides "similarly situated" employees with the "right" to bring a  
21 collective action against their employer:

22 An action . . . may be maintained against any employer . . . by any one or  
23 more employees for and in behalf of himself or themselves and other  
24 employees similarly situated. No employee shall be a party plaintiff to any  
25 such action unless he gives his consent in writing to become such a party and  
26 such consent is filed in the court in which such action is brought. . . . The  
right . . . to bring an action by or on behalf of any employee, and the right of  
any employee to become a party plaintiff to any such action, shall terminate  
upon the filing of a complaint by the Secretary of Labor . . . .

27 29 U.S.C. § 216(b).

28 The seminal Ninth Circuit case regarding FLSA collective actions is *Campbell v.*

1 *City of Los Angeles*, 903 F.3d 1090 (9th Cir. 2018). In *Campbell*, the Ninth Circuit  
 2 explained that, under § 216(b), “workers may litigate jointly if they (1) claim a violation  
 3 of the FLSA, (2) are ‘similarly situated,’ and (3) affirmatively opt in to the joint litigation,  
 4 in writing.” *Id.* at 1100. The court further explained that this right “has two permutations”:  
 5 (1) “[t]he right . . . to bring an action by or on behalf of any employee”; and (2) “the right  
 6 of any employee to become a party plaintiff to any such action”—“that is, the right to bring  
 7 the collective litigation and the right to join it.” *Id.*

8 Turning to the procedures and standards governing FLSA collective actions, the  
 9 *Campbell* court noted that a judicially-crafted “two-step ‘certification’ process” had  
 10 become “near-universal” and therefore chose to “adhere” to the terms “preliminary  
 11 certification” and “decertification” in the FLSA context because they are “widespread,”  
 12 with the caveat that adherence to this terminology does not “imply that there should be any  
 13 particular procedural parallels between collective and class actions.” *Id.* at 1100-02. The  
 14 court further clarified that, under the two-step certification process, “plaintiffs will, at some  
 15 point around the pleading stage, move for ‘preliminary certification’ of the collective  
 16 action, contending that they have at least facially satisfied the ‘similarly situated’  
 17 requirement,” and then “[l]ater, after the necessary discovery is complete, defendants will  
 18 move for ‘decertification’ of the collective action on the theory that the plaintiffs’ status as  
 19 ‘similarly situated’ was not borne out by the fully developed record.” *Id.* at 1100.  
 20 Although the court acknowledged that both steps involve evaluating whether the plaintiffs  
 21 are “similarly situated,” it emphasized that courts apply different standards at each step:

22 Preliminary certification, as noted, refers to the dissemination of notice to  
 23 putative collective members, conditioned on a preliminary determination that  
 24 the collective as defined in the complaint satisfies the “similarly situated”  
 25 requirement of section 216(b). At this early stage of the litigation, the district  
 26 court’s analysis is typically focused on a review of the pleadings but may  
 27 sometimes be supplemented by declarations or limited other evidence. The  
 28 level of consideration is “lenient”—sometimes articulated as requiring  
 “substantial allegations,” sometimes as turning on a “reasonable basis,” but  
 in any event loosely akin to a plausibility standard, commensurate with the  
 stage of the proceedings.

[ . . . ]

Assuming the collective action has survived its earlier scrutiny, the second

1 stage will come at or after the close of relevant discovery. The employer can  
2 move for “decertification” of the collective action for failure to satisfy the  
3 “similarly situated” requirement in light of the evidence produced to that  
4 point. The district court will then take a more exacting look at the plaintiffs’  
5 allegations and the record. Because of its purpose and timing, decertification  
6 can resemble a motion for partial summary judgment on the “similarly  
7 situated” question, and may be combined with cross-motions for summary  
8 judgment.

9 *Id.* at 1109-10 (cleaned up). The court noted that “the two-step process . . . has the  
10 advantage of ensuring early notice of plausible collective actions, then eliminating those  
11 whose promise is not borne out by the record.” *Id.* at 1110.

12 In *Campbell*, a decertification motion was at issue, so the “more exacting”  
13 summary-judgment-like standard applied, as opposed to the “lenient” plausibility-like  
14 standard that applies to a conditional certification motion. Nevertheless, because  
15 certification and decertification motions both ask the district court to consider whether the  
16 plaintiffs are “similarly situated,” the discussion in *Campbell* of the meaning of that  
17 statutory term is relevant for both steps in the two-step process.

18 *Campbell* rejected the two prevailing approaches to the “similarly situated”  
19 requirement that had emerged up to that point. The first rejected approach, dubbed the  
20 “minority approach,” would require FLSA collectives “to satisfy the [Rule 23]  
21 requirements of numerosity, commonality, typicality, adequacy, predominance, and  
22 superiority.” *Id.* at 1111. The court concluded that this approach was flawed because it  
23 “rests improperly on an analogy to Rule 23 lacking in support in either the FLSA or the  
24 Federal Rules of Civil Procedure,” imports “rules specific to class actions [which] have  
25 evolved to protect the due process rights of absent class members, a consideration not  
26 pertinent under the post-1947 FLSA,” and fails to take into account the “lower bar” for  
27 FLSA collective actions, to which employees have a statutory “right.” *Id.* at 1112-13. The  
28 second rejected approach, dubbed the “majority approach” or “ad hoc test,” would require  
district courts to “appl[y] a three-prong test that focuses on points of potential factual or  
legal *dissimilarity* between party plaintiffs” by first considering the “disparate factual and  
employment settings of the individual plaintiffs,” then considering the “various defenses

1 available to defendants which appear to be individual to each plaintiff,” and finally  
 2 considering “fairness and procedural considerations.” *Id.* at 1113. The court identified  
 3 “two major flaws” with this approach: (1) it “offers no clue as to what *kinds* of ‘similarity’  
 4 matter under the FLSA,” such that “[i]t is, in effect, a balancing test with no fulcrum”; and  
 5 (2) the “fairness and procedural considerations” prong “invites courts to import, through a  
 6 back door, requirements with no application to the FLSA—for example, the Rule 23(b)(3)  
 7 requirements of adequacy of representation, superiority of the group litigation mechanism,  
 8 or predominance of common questions.” *Id.* at 1114-15.

9 Having rejected both prevailing approaches, the Court articulated the following  
 10 definition of “similarly situated” (for FLSA purposes) that courts within the Ninth Circuit  
 11 must employ:

12 [P]arty plaintiffs must be alike with regard to some *material* aspect of their  
 13 litigation. That is, the FLSA requires similarity of the kind that allows  
 14 plaintiffs the advantage of lower individual costs to vindicate rights by the  
 15 pooling of resources. That goal is only achieved—and, therefore, a collective  
 16 can only be maintained—to the extent party plaintiffs are alike in ways that  
 matter to the disposition of their FLSA claims. If the party plaintiffs’ factual  
 or legal similarities *are* material to the resolution of their case, dissimilarities  
 in other respects should not defeat collective treatment.

17 *Id.* at 1114 (cleaned up). Put another way, “[p]arty plaintiffs are similarly situated, and  
 18 may proceed in a collective, to the extent they share a similar issue of law or fact material  
 19 to the disposition of their FLSA claims.” *Id.* at 1117. “[D]ifference” is not  
 20 “disqualifying”—rather, “the requisite kind of similarity” is the “basis for allowing  
 21 partially distinct cases to proceed together.” *Id.*

22 Under this definition, the members of an FLSA collective do not need to have  
 23 “overall sameness.” *Id.* at 1116. For example, in *Campbell*, it was enough for the plaintiffs  
 24 to demonstrate that they were subject to the same “overall policy” regardless of whether  
 25 they “worked on different tasks, in different divisions, and under different supervisors”  
 26 because “[a] systemic policy is no less common across the collective if those subject to it  
 27 are affected at different times, at different places, in different ways, or to different degrees.”  
 28 *Id.* In that case, “[t]he district court emphasized also that the [plaintiffs] worked different

1 hours and claimed overtime of different amounts, including some amounts that might have  
 2 been de minimis,” but the Ninth Circuit stated that “those distinctions go to the  
 3 individualized calculation of damages or the individualized application of defenses” and  
 4 “do not preclude collective treatment for the purpose of resolving the common issue that  
 5 *does* exist, and that must be answered in the first instance.” *Id.* The court elaborated that  
 6 “individualized damages calculations” are not “inherently inconsistent with a collective  
 7 action” because “if a common question regarding the employer’s liability is answered in  
 8 the plaintiffs’ favor, individualized calculations of work hours may readily be addressed  
 9 with any of the practices developed to deal with Rule 23 classes facing similar issues.” *Id.*  
 10 Considering that the “amount of damages is invariably an individual question and does not  
 11 defeat class action treatment” in the Rule 23 context, the court held that “[i]ndividual  
 12 damages amounts cannot defeat collective treatment under the more forgiving standard of  
 13 section 216(b) either.” *Id.* at 1117.

14 Finally, the court clarified that “the FLSA does not give district courts discretion to  
 15 reject collectives that meet the statute’s few, enumerated requirements.” *Id.* at 1115. “As  
 16 is true in all FLSA cases,” the “background principle” is that “because the FLSA is a  
 17 remedial statute, it must be interpreted broadly.” *Senne v. Kansas City Royals Baseball*  
 18 *Corp.*, 934 F.3d 918, 950 (9th Cir. 2019) (citation omitted). “The ‘similarly situated’  
 19 standard at [the conditional certification] phase is fairly lenient and typically results in  
 20 certification.” *Roberts v. Sidwell Air Freight Inc.*, 2022 WL 16949565, \*8 (W.D. Wash.  
 21 2022) (quotation omitted).

## 22 II. Analysis

23 Plaintiffs argue that conditional certification is warranted because Spencer’s is “a  
 24 joint-employer for purposes of the FLSA,” “the putative class members were the victims  
 25 of a single decision, policy, or plan depriving them of overtime,” “Spencer’s elaborate  
 26 system of multiple other intermediary entities”—which is “clearly in place for the purpose  
 27 of avoiding employer obligations, including payment of overtime under the FLSA”—“does  
 28 not insulate it from its obligation to comply with the FLSA,” “Spencer’s knew of the

1 significant work time suffered or permitted to be performed,” and “Plaintiff and all current  
2 and former installers are a similarly situated homogeneous group [who] all work out of the  
3 same Spencer’s location, are all covered by identical operation guidelines, share a common  
4 set of Spencer’s supervisors who know installers are working uncompensated overtime,  
5 and are all covered by a common set of overtime policies.” (Doc. 41 at 9-10.) Plaintiffs  
6 further argue that they have alleged that Spencer’s violation of the FLSA was “willful,”  
7 and because willfulness is a merits consideration that cannot be resolved at this phase of  
8 the litigation, notice should be sent to installers who worked within the past three years  
9 (the extended recovery period applicable to willful violations). (*Id.* at 10-11.) Plaintiffs  
10 seek to provide notice via mail and email with one reminder notice and request a 90-day  
11 opt-in period. (*Id.* at 12.)

12 Spencer’s response incorporates its motion for summary judgment by reference  
13 (Doc. 44 at 7) and asserts that the Court must “review the merits of Plaintiffs’ claims” to  
14 determine that “Spencer’s was NOT the joint employer of Plaintiffs,” which, according to  
15 Spencer’s, means that the preliminary certification motion should be denied. (*Id.* at 13.)  
16 Throughout its response, Spencer’s relies on Rule 23 and case law pertaining to class  
17 certification. (*Id.* at 2, 4-7, 13.) Spencer’s did not respond to Plaintiffs’ requests regarding  
18 the specifics of the notice—*i.e.*, that notice be sent to installers who worked within the past  
19 three years, that Spencer’s provide all known contact information including email  
20 addresses for the collective, that notice be provided via mail and email with one reminder  
21 notice, or that the opt-in period be 90-days.

22 In reply, Plaintiffs point out that Rule 23 is inapposite and that “confusion”  
23 regarding how FLSA collective actions differ from Rule 23 class actions “seems to have  
24 affected Spencer’s Response.” (Doc. 47 at 2-4.) Plaintiffs then—perhaps in an abundance  
25 of caution—argue that they should prevail on their preliminary certification motion even  
26 if Rule 23 applied and a merits determination were appropriate when deciding this motion.  
27 (*Id.* at 5-10.)

28 The analysis here is not difficult. Spencer’s opposes the preliminary certification

1 request based on legal standards that are inapplicable in this context. Spencer's motion for  
2 summary judgment, filed the same day as its response to the preliminary certification  
3 motion, asks the Court to determine, as a matter of law, whether Spencer's is the installation  
4 employees' joint employer. Without prejudging how that issue will ultimately be resolved  
5 on the merits, this framing underscores why the collective is similarly situated (and, thus,  
6 why preliminary certification is warranted), as the installation employees clearly "share a  
7 similar issue of law or fact material to the disposition of their FLSA claims," *Campbell*,  
8 903 F.3d at 1117—*i.e.*, whether Spencer's is their joint employer. There are also other  
9 shared issues of law identified in the parties' briefing—for example, assuming Spencer's  
10 is the employees' joint employer, whether Spencer's willfully ignored the employees'  
11 overtime work.

12 Because the collective members are similarly situated, the preliminary certification  
13 motion is granted. The Court finds it appropriate to rule on this request now, despite the  
14 pendency of Spencer's summary judgment motion, because preliminary certification  
15 requests should be resolved during an "early stage of the litigation" and are "typically  
16 focused on a review of the pleadings." *Campbell*, 903 F.3d at 1109.

17 Finally, Spencer's response did not address Plaintiffs' requests that notice should  
18 be sent to installers who worked within the past three years, that Spencer's provide all  
19 known contact information including email addresses for the collective, that notice should  
20 be sent via mail and email with one reminder notice, and that the opt-in period should be  
21 90 days, and therefore those requests are granted. Plaintiffs may send notices consistent  
22 with this order.

23 Accordingly,

24 **IT IS ORDERED** that Plaintiffs' preliminary certification motion (Doc. 41) is  
25 **granted**. The collective, as defined in this order, is preliminarily certified.

26 **IT IS FURTHER ORDERED** that Spencer's shall provide Plaintiffs with all  
27 known contact information including email addresses for the collective by December 8,  
28 2023.

